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Syarikat Steelcon Sdn Bhd v Kee Cheng Teck

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-341–04 OF 2013
AZIMAH OMAR JC
30 OCTOBER 2014

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Civil Procedure — Abuse of process — Winding up action — Action against solvent company — Two winding up petitions struck off by court — Whether there was malicious prosecution — Refusal to pay judgment sum — Whether losses proved — Whether company entitled to nominal damages

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After successfully obtaining a judgment debt against the plaintiff in the sum of RM496,589.61 in the High Court, the defendant issued a notice of demand under s 218 of the Companies Act 1965 ('the Act') against the plaintiff. The defendant then filed a winding up petition ('the first winding up petition') which was struck off. Another notice of demand was issued and the winding up petition that followed ('the second winding up petition') was struck off. The reason as to why both the first and second petitions were struck off was because the plaintiff was still a solvent company. The judgment debt was never settled by the plaintiff. In the present suit, the plaintiff submitted that based on the striking out of the first and second winding up petitions, the defendant was guilty of tort of malicious prosecution and abuse of process.

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Held, allowing the claims:

(1) The plaintiff had proven the first element of malicious prosecution. As for the second element, the plaintiff was solvent and able to pay its debts at the time the defendant had filed the two petitions against the plaintiff. Hence, the two petitions were wrongfully presented and this was void of reasonable and/or probable cause. As for the third element of whether the defendant, in filing the petition was actuated by malice or improper motive, though an unpaid creditor may lodge a petition to wind up, a winding up petition should not be lodged where the debtor is still solvent. The defendant's witnesses admitted that they were aware of the plaintiff as a big company which was capable but reluctant to pay and that he only pursued winding up because it was the cheapest and accessible remedy to get his monies. Hence, the plaintiff had successfully proven its case on the tort of malicious prosecution (see paras 22, 30 & 33).

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(2) The losses allegedly suffered from the petitions were actually motivated by the plaintiff's own reluctance to settle the judgment debt. Although

A the petitions were an abuse of process, the two petitions came out from the plaintiff's own refusal to pay. Although the petitions were wrongly presented, the court would not allow the plaintiff to profit from a wrong which the plaintiff itself had indirectly contributed to. The plaintiff may have suffered damages from the wrongful conduct of the defendant but B the plaintiff was only entitled to nominal damages as it had not adduced cogent evidence to prove the extent of damages suffered attributable to the conduct of the defendant (see paras 5 & 41).

[Bahasa Malaysia summary

C Selepas berjaya mendapatkan hutang penghakiman terhadap plaintif sejumlah RM496,589.61 di Mahkamah Tinggi, defendan mengeluarkan notis tuntutan di bawah s 218 Akta Syarikat 1965 ('Akta') terhadap plaintif. Defendan kemudiannya memfailkan petisyen penggulungan ('petisyen penggulungan pertama') yang mana dibatalkan. Notis tuntutan yang lain dikeluarkan dan D petisyen penggulungan yang berikutnya ('petisyen penggulungan kedua') dibatalkan. Alasan mengapa kedua-dua petisyen pertama dan kedua dibatalkan adalah kerana plaintif adalah masih syarikat solven. Hutang penghakiman tidak pernah diselesaikan oleh plaintif. Dalam tindakan ini, plaintif berhujah bahawa berdasarkan ke atas pembatalan petisyen E penggulungan pertama dan kedua, defendan adalah bersalah terhadap tort pendakwaan berniat jahat dan penyalahgunaan proses.

Diputuskan, membenarkan tuntutan-tuntutan:

F (1) Plaintif telah membuktikan unsur pertama pendakwaan berniat jahat. Untuk unsur kedua, plaintif adalah solven dan boleh membayar hutangnya pada masa defendan telah memfailkan kedua-dua petisyen terhadap plaintif. Maka, kedua-dua petisyen adalah salah dikemukakan dan tidak langsung ada sebab munasabah dan/atau berkemungkinan. G Untuk unsur ketiga sama ada defendan, dalam memfailkan petisyen didorong oleh niat jahat atau motif tidak betul, walaupun pemiutang tidak dibayar mungkin akan membuat petisyen untuk menggulung, petisyen penggulungan tidak patut dibuat di mana penghutang adalah masih solven. Saksi-saksi defendan mengaku bahawa mereka sedar H bahawa plaintif sebagai syarikat besar yang mampu tetapi enggan untuk membayar dan bahawa dia hanya mengejar penggulungan kerana ia adalah remedi paling murah dan mudah untuk mendapatkan duitnya. Maka, plaintif telah berjaya membuktikan kesnya atas tort pendakwaan berniat jahat (lihat perenggan 22, 30 & 33).

I (2) Kerugian yang didakwa dialami daripada petisyen-petisyen tersebut sebenarnya didorong oleh keengganan plaintif sendiri untuk menyelesaikan hutang penghakiman. Walaupun petisyen-petisyen adalah penyalahgunaan proses, kedua-dua petisyen datang daripada keengganan plaintif sendiri untuk membayar. Walaupun

petisyen-petisyen salah dikemukakan, mahkamah tidak akan membenarkan plaintif untuk untung daripada kesilapan yang plaintif sendiri telah secara tak langsung menyumbang kepadanya. Plaintif mungkin mengalami kerugian daripada salah laku tindakan defendan tetapi plaintif hanya berhak kepada ganti rugi nominal kerana ia tidak mengemukakan keterangan jelas untuk membuktikan sejauh mana ganti rugi yang dialami berpunca daripada tingkah laku defendan (lihat perenggan 5 & 41).]]]

Notes

For cases on abuse of process in general, see 2(1) *Mallal's Digest (4th Ed, 2014 Reissue)* paras 12–29.

Cases referred to

Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd [2002] 4 MLJ 390, HC (refd)

BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 MLJ 356, HC (refd)

Cadiz Waterworks Company v Barnett [1874] C 283 (refd)

Hock Huat Iron Foundry (Suing As A Firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21, HC (refd)

Johnson v Emerson And Sparrow [1871] 6 Exch 329 (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

Malaysian Building Society Bhd v Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)

Malz v Rosen [1966] All ER 10 (refd)

Morgan Guaranty Trust Co Of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

Onkarmal & Anor v Banwarilal & Ors AIR 1962 Raj 127, HC (refd)

Pacific & Orient Insurance Co Bhd v Krishna Moorthy Veerappan [2010] 7 CLJ 385, HC (refd)

Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn v ASM Development Sdn Bhd (formerly Known As Sobena Maju Sdn Bhd) [2003] 4 MLJ 633, FC (refd)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810, HC (refd)

Quartz Hill Consolidated Gold Mining Co v Eyre [1883] 11 QBD 674, CA (refd)

Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509; [1996] 3 CLJ 657, SC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Companies Act s 218
Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

Harminder Singh (Avtar Singh with him) (Faizah, Mahinder & Co) for the plaintiff.
Lee Chan Leong (Emily Siew Ee Mei with him) (Chan Leong & Co) for the defendant.

Azimah Omar JC:

[1] The plaintiff in this case had initiated this action against the defendant for damages on the grounds of these two causes of actions:

(a) The tort of malicious prosecution against the defendant's conduct in pursuing the winding up petition in 2009 in the Winding Up Action No D1–28–344 of 2009 ('the first petition') and also the winding up petition in 2013 in the Winding Up Action No 28NCC-50–02 of 2014 ('the second petition').

(b) The tort of abuse of process against the defendant's conduct in pursuing both of the first petition and the second petition.

[2] In its statement of claim the plaintiff had pleaded that pursuant to the alleged tortious conducts of the defendant mentioned in paras 1(a) and (b) above, the plaintiff had suffered losses (including loss of profits and/or loss of reputation or goodwill of the plaintiff company) and therefore claimed the following reliefs:

(a) Damages to be assessed not exceeding RM5m to be paid by the defendant to the plaintiff;

(b) Interest on the damages at the rate and from the date as determined assessed by this court to be paid by the defendant to the plaintiff; and

(c) Further and/or such other reliefs as may be given by this court as deemed fair and just in favour of the plaintiff against the defendant.

[3] Now, before the two causes of actions of the plaintiff may be addressed, it is pertinent that the background underlying this present action be understood for a proper and just appreciation of the case. The following are the salient facts which had been submitted by both of the parties in their evidence and also the agreed facts which was filed.

(a) The defendant had first obtained a judgment debt against the defendant in 2007 from the Tawau High Court dated 4 October 2007 which held

that the plaintiff is indebted to the defendant a sum of RM496,589.61 together with pre-judgment interest at the rate of four per centum (4%) per annum from 13 March 2000 the date of the writ of summons to 4 October 2007 the date of judgment pursuant to s 11 of the Civil Law Act 1956 and statutory interest at the rate of eight per centum (8%) per annum from 5 October 2007 to the date of payment and the defendant to pay the plaintiff his costs to be taxed ('the judgment debt') in suit No T(22) 8 of 2000;

(b) The plaintiff had subsequent to the judgment debt proceeded to appeal against the decision at the Court of Appeal which was later dismissed on 20 September 2011. Following the dismissal of the appeal, the plaintiff then had applied for a stay of execution of the judgment debt which also was later dismissed by the Court of Appeal on 14 May 2012. The plaintiff then had applied for leave to appeal against the Court of Appeal's decision in upholding the judgment debt and even this application was dismissed and leave was not granted;

(c) Stemming from the judgment debt, the defendant had first issued a statutory notice of demand under s 218 of the Companies Act against the plaintiff and proceeded to file the first petition in the year 2009. However, the first petition was later struck off for abuse of process under O 18 r 19(1)(b) and/or (c) and/or (d) of the Rules of the High Court on the ground that the defendant (the petitioner in the first petition) had initiated the petition notwithstanding the fact that the plaintiff (the respondent in the first petition) was still solvent. The defendant consequently applied to appeal against the decision to strike off the petition but however, the defendant himself later had withdrawn his appeal;

(d) Also on the basis of the judgment debt, the defendant again had issued another statutory notice of demand under s 218 of the Companies Act against the plaintiff and proceeded to file the second petition in the year 2014. However, the second petition was also dismissed on the same reason that the plaintiff (the respondent in the second petition) was still a solvent company on 25 June 2014 by the High Court of Malaya in Kuala Lumpur;

(e) The judgment debt at any time was never settled by the plaintiff in the present case; and

(f) The plaintiff in the present case had initiated this action for the tort of malicious prosecution and/or tort of abuse of process based on the two winding up petitions initiated by the defendant namely the first and the second petitions.

[4] Before this court would proceed to make its findings, the court would

first delve into the submissions of both the plaintiffs and the defendant's cases.

THE PLAINTIFF'S CASE

[5] On the perusal of the plaintiff's opening submission and its submission in reply, the plaintiff's case had been submitted as follows:

The claim on tort of malicious prosecution

(a) The plaintiff on the outset submitted that both of the first and second petitions were dismissed on the same ground that the petition was filed notwithstanding the fact that the plaintiff remains a solvent company.

(b) The plaintiff sought to prove all the necessary elements of the tort of malicious prosecution, which can be branched out into four elements which are:

(i) First element – The plaintiff was successful in the earlier proceedings brought by the defendant.

In proving this element, the plaintiff submitted that the plaintiff indeed had been successful in not only one but two earlier proceedings which were brought by the defendant against it. Those earlier proceedings are namely the first and second petitions which were subsequently dismissed by the High Court.

(ii) Second element – The defendant had instituted the earlier proceedings (the two petitions) without any reasonable and/or probable cause.

The plaintiff had submitted that there was a want of reasonable and/or probable cause on the submission that the two petitions were filed blatantly notwithstanding the defendant's knowledge and admission of the plaintiff's solvency and ability to pay its debts. The plaintiff submitted that it is established in law that the petitions were wrongful petitions on the ground that the petitions were filed when there was ample evidence which proves that the plaintiff was solvent and were able to pay their debts at the time the petitions were filed. It must be noted that this proposition of law was not contested and was agreed to be relevant in the present case, as even the defendant in hindsight was attempting to prove that the plaintiff was in actuality unable to pay its debts. The plaintiff had referred to a number of cases supporting its proposition.

First of which is a decision by our then Supreme Court in the

case of *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509; [1996] 3 CLJ 657 which had affirmed the decision in the case of *Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674 which had held:

... that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shown, there was a want of reasonable and probable cause for presenting the petition ...

The plaintiff also referred to the case of *Pacific & Orient Insurance Co Bhd v Krishna Moorthy Veerappan* [2010] 7 CLJ 385 where the court had held the following:

Section 218(1)(e) of the Companies Act 1965 requires the court to wind up a company which was unable to pay as opposed to unwilling to pay its debts.

To which the plaintiff had submitted evidences in supporting its contention:

Firstly, it was submitted that there were numerous evidences in PW3's witness statement which were left unchallenged. Particularly on PW3's testimony that amidst the plaintiff's principle objection that the plaintiff is indeed solvent, the defendant knew or ought to have known that the plaintiff was solvent and able to pay its debts.

Furthermore, the conduct of the defendant himself in withdrawing his appeal against the striking out of the first petition should be perceived as an admission of the correctness of that decision and the decision should remain binding and final against the defendant as it was uncontested or was not appealed against. Even in respect of the second petition, the plaintiff had sent letters to the defendant expressing the same objection that it is solvent. Nonetheless, the defendant chose to ignore the plaintiff's objection and proceeded to file the second petition. Hence, even during the first petition, and even at the second petition's stage, the defendant had blatantly filed the two petitions having or ought to have full knowledge that the plaintiff was indeed solvent was able to pay its debts.

Secondly, it was also submitted that the two petitions were also dismissed for the same reason that the plaintiff was proven to be solvent and was able to pay its debts. The dismissal of the first petition was even admitted and accepted by the defendant as he had not appealed against the dismissal of the first petition.

Thirdly, the plaintiff submitted that even the defendant's own witnesses had admitted to have knowledge that the plaintiff was solvent and able to

pay its debts and that the defendant was pursuing for winding up only for the sake of saving cost and convenience to corner the plaintiff to pay the judgment debt.

This court in reference to the notes of evidence ('NOE') reproduces these excerpts which the court found relevant to the plaintiff's submission at p 123 of the NOE:

> KEE: Saya Winding Up because he is a big company. He is a big company, he will not allow me to Winding Up. He will pay me, he will make a point to pay me but he still stubborn, he don't want to pay me...
>
> HMS: Encik Kee, saya cakap sama Encik Kee punya niat. Saya tunjukkan, sebelum fail Winding Up Encik Kee sudah tahu dia ada duit boleh bayar. Betul?
>
> KEE: Memang saya tahu. Ya. That's why.

(iii) Third element – The defendant had conducted himself in malice in the sense that there was some indirect or improper motive in him taking or continuing with the two petitions.

There the proof of malice had been submitted in two-folds, in that there was malice in filing the first petition and also that there was malice in filing the second petition. The plaintiff had submitted that malice in this case before the court was the blatant conduct of the defendant in pursuing the two petitions in complete disregard of the law and also the decision of the High Court in dismissing the first petition.

It was further submitted that the unjustified petitions had cornered the plaintiff to lose face as it was advertised to have been petitioned for winding up following the proper procedures of a winding up petition. The conduct of the defendant in cornering the plaintiff to be injured while knowing full well that they are not lawfully justified to petition for winding up can be inferred as malice as the defendant had chosen, amidst all other modes of execution readily available to the defendant, to petition for winding up which was unavailable to them which puts the plaintiff under unnecessary peril. The plaintiff had referred to the case of *Quartz Hill Consolidated Gold Mining Company* (p 6) which had made the following observation by Brett MR on the injurious nature of a winding up petition if maliciously or unjustly pursued:

> It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely at the trial... In my opinion it is more like bankruptcy action and the very touch stone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations against it; for the petitioner is bound to publically advertise the petition seven days before it is to be heard and adjudicated upon.

The plaintiff had also referred to the case of *Cadiz Waterworks Company v Barnett* [1874] C283 which had held the following:

> He thinks if he can make it public, if he presents this petition, that it would be so injurious to the company that, rather than submit to it, they will settle with him. Cases have been cited to show that this court will not interfere with serving a debtors summons, and will not interfere with serving a debtors summons and will not interfere with various other processes; *but a Winding Up is a totally different thing*. How does it begin? Petition presented, then advertise in the London Gazette, from the London Gazette copied into a great number of newspapers *which have a large circulation* in England, and I suppose also in Spain. What is the result? *Here is a company perfectly solvent*, which has a fair prospect, as far as I have heard, of being successful, and *you have it advertised in every paper* in England that there is a petition presented to wind them up, *a petition which it must be known perfectly well to the petitioner never can succeed.* For what purpose is it presented? Why, simply because the petitioner thinks he will by such means obtain his demand-and, for all I can see, *it may be a very unjust demand*.

The plaintiff further submitted to define 'malice' as per the definition in *Black's Law Dictionary* which defines malice as the intent, without justification or excuse, to commit a wrongful act (in the present case, the defendant's alleged unjustified petitions against the plaintiff) or reckless disregard of the law or of a person's legal rights (in the present case, the alleged reckless disregard of the law that a winding up petition may not be filed if there were proof that the respondent is solvent).

The plaintiff had also referred to the case opinion by the court in the case of *Malz v Rosen* [1966] All ER 10 on evidence of malice:

> per curiam: if a person gives the police an account which he knows to be untrue, that fact in itself would be strong evidence of the ingredient of malice necessary for a successful action for malicious prosecution...

The plaintiff had likened the conduct of the defendant in filing the two petitions knowingly that the plaintiff was solvent while attempting to prove the fact that the plaintiff was insolvent as giving an untrue account of the plaintiff's solvency to the court to the conduct of giving the police an untrue account.

The plaintiff further referred to the case of *Johnson v Emerson And Sparrow* [1871] 6 Exch 329 in proving malice:

> apprehend that the mere fact of the defendant taking the proceedings with the knowledge and belief that they could not be properly taken, would be some evidence of malice.
>
> ...that the proceeding of the defendant was false and malicious ...is the same thing that a reasonable and sensible knowing the facts and circumstances which the defendant did, would have formed the conclusion that the

> proceeding was groundless. They also means that it was malicious. Malice in a legal sense means a wrongful act done intentionally without just cause and excuse ... and I quite agree that if an attorney, knowing a proceeding in bankruptcy to be groundless, presented a petition either from the motive of gain to himself or in obedience to the instructions of an oppressive and vindictive client, it would be in law a malicious act.

(iv) Fourth element – The plaintiff had suffered losses from the malicious prosecution.

Here the plaintiff had vigorously relied on the testimony of its witnesses and the audited accounts of the plaintiff in proving the loss of business suffered by the plaintiff due to the defendant's alleged malicious prosecution. The plaintiff had referred to the case of *Onkarmal & Anor v Banwarilal & Ors* AIR 1962 Raj 127 which was decided by the Rajasthan High Court in 1961. The Rajasthan High Court had dealt with a claim for general damages in the sense of 'disgrace, humiliation, physical discomfort and mental suffering'. With regard to this head of damages the Rajasthan High Court had held:

> ... where the plaintiff claims general damages, it is not necessary for him to prove such damages specifically, the reason is that general damages are considered at law to be pecuniary reparation for the damage which is presumed to follow from the injury, and therefore, which is not required to be separately averred or proved.

The claim on tort of abuse of process

[6] The plaintiff also sought to prove a case for tort of abuse of process. Here, the submission on this cause of action mostly mirrors the submission for the tort of malicious prosecution. The plaintiff mainly submits on the impropriety of the two petitions for want of reasonable and/or probable cause. It was submitted that again, the defendant had never appealed against the decision of the High Court in 2009 by Zaharah bt Ibrahim J in dismissing the first petition which reads:

> I was satisfied that the Respondent at the time of the presentation of the Petition was a solvent company. A petition to wind up a solvent company is an abuse of the process of the Court ...

Similarly, with regard to the second petition, the petition had been dismissed in 2014 on the same ground that the court had found that the plaintiff was solvent company. And the defendant had persisted with the second petition even after the plaintiff had disputed the same issue on solvency against the defendant vide letters which were admitted to have been received by the defendant but was ignored.

As for the proof of damages suffered, the plaintiff submits the same should apply as per the quantum of damages submitted in proving its case of malicious prosecution.

THE DEFENDANT'S CASE

[7] It must be noted at the outset that the submission offers little contest to the law relied upon by the plaintiff. The defence's submission is mostly constructed to disprove the elements sought to be proven by the plaintiff. This court is minded that the defendant in his submission had focused mainly to disprove the allegation of abuse of process from their conduct of filing the two petitions. And flowing from the disproval of the allegation of abuse of process, it boils down to the disproval of the tort of malicious prosecution as well as in disproving the abuse of process, it disproves one of the elements of malicious prosecution sought to be proven by the plaintiff. This court is also minded that the defendant had persistently contended that his conduct was incited by the reluctance of the plaintiff to settle the judgment sum which had stood for many years.

(a) In disproving the malicious intent alleged by the plaintiff against the defendant's conduct the defendant firstly submits that the motives in which the petitions were filed is an irrelevant consideration and that it is an accepted prima facie rule that an unpaid creditor has a right to file a winding up petition whatever his motives are.

(b) On the outset to this submission this court is minded the counsel for the defendant had quoted the case relied upon to its full extent by omitting the word other and quoted 'motives' instead of the supposed 'other motives'. The precedent concerned and the excerpt so quoted was in the case of *Morgan Guaranty Trust Co Of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95:

> (b) prima facie a creditor who is not paid has a right to file a petition for a winding-up order whatever may be his *other motives* (Emphasis added.)

The defendant then submitted that the case above was also applied in the more recent case of *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810 in which the Supreme Court had dealt with an appeal against the striking off of a winding up petition by the trial court on the ground that the petition was 'stage managed'. Justice Abdul Malik Ishak in delivering the judgment of the Supreme Court had held:

> It is a correct statement of the law to say and I so say that prima facie, the petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent.

In reliance of these two cases the defendant submits that it is the prima facie right of the petition to file the petitions. The plaintiff has no business in questioning the motives behind the conduct of the defendant in filing the petitions and hitherto the court may not infer abuse of process and/or malicious intent from the conduct of the defendant in filing the two petitions in 2009 and 2014.

(c) The defendant in submitting against the plaintiff's allegation of tort of abuse of process had submitted that the conduct of the defendant in filing the two petitions was a valid legal redress and was not an abuse of process.

(i) Firstly, in disproving the tort of abuse of process, the defendant submits that he indeed has a cause to file the two petitions against the plaintiff. It was submitted that the defendant had long been ran on a negative cash flow in that the plaintiff is running on borrowings since the company itself cannot run by itself on its positive income and had to depend on borrowings. In supporting this contention, the defendant had produced a table of the plaintiffs audited account from years 2008 till 2012. The defendant also referred to the admission of PW3 in the Notes of Evidence ('NOE') at p 64 line 31–32:

LCL: Negative cash flow?

AVATAR: But we have been. I have been operating the company since 1977 and we have never had a positive cash flow because.

Based on this evidence, the defendant purported to refer to the case of *Pioneer Concrete v Celini Corp* (p 16) which had laid down the test of 'commercial insolvency' in the determination of a judgment debtor's ability to pay its debts. The relevant excerpt of the judgment delivered by Abdul Malik Ishak is:

> It is germane to mention that the *test of commercial insolvency* is simple. It is this. *Whether the company is unable to meet its current debts as they fall due?* A company *may have substantial wealth which cannot be realised immediately* and if that happens the company is said to be *unable to pay its debts within the purview and ambit of s 218(1)(e)* of the Companies Act 1965 and this is so even though on l*iquidation the company will be able to meet all its liabilities* ...(Emphasis added.)

The defendant further submits that the fact that the assets of the plaintiff might exceed its liability does not infer that the plaintiff is solvent and able to pay its debts. It is incumbent instead for the plaintiff to prove that it has immediate realizable wealth at the time the debt falls due. The defendant referred to the case of *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ

356:

> And in dealing with 'commercial insolvency'. that is, of a company being unable to meet current demands upon it, the Federal Court in Sri Hartamas followed the Privy Council in the case of *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53, and cited the following observations from Buckley on the *Companies Act* (13th Ed) at p 460:
>
> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. *A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up*.

(see also *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21)

(ii) It was also briefly submitted that generally, inability to pay debt is proved by service of the statutory notice under s 218 of the Companies Act 1965 and the subsequent failure to comply with any such statutory notice.

(iii) In furtherance to disprove any abuse of process, the defendant submitted that as a judgment creditor, it is well within the discretion and rights of the judgment creditor to elect whatever mode of execution that is most expedient to him. The defendant relied on the case of *Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn v ASM Development Sdn Bhd (formerly known as Sobena Maju Sdn Bhd)* [2003] 4 MLJ 633 in which Abdul Hamid Mohamad FCJ (as he then was) had held:

> It is true that the appellant did not appeal against the order of the SAR striking out the first suit but, that is a matter for the appellant to decide. The appellant had an option whether to try to save the first suit or to abandon it and file a fresh suit. Indeed, upon an objection being raised, if it is true that the first suit was commenced without authority, the appellant could on its own accord, discontinue the action and file a fresh one. That clearly would not be an abuse of the process of the court. To sum up, on the facts of this case, where the appellant had two options before it, the fact that it chooses one and not the other, is not an abuse of the process of the court.

(iv) The defendant further sought to disprove abuse in disputing the element of initiating the action for some other purpose other than to attain genuine redress, (see *Malaysian Building Society Bhd v Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed* [1998] 2 MLJ 425) It was submitted that since there is no mal-intent and the defendant was well within its rights to petition for winding up, his

conduct in filing the two petitions were conducts purposed for the genuine redress to recover the judgment owed by the plaintiff against the defendant.

(v) The defendant reiterates the fact that the plaintiff may not contest the second petition as the judgment debt had stood even after the line of appeals of the plaintiff which was subsequently dismissed by the Court of Appeal and even the Federal Court. The plaintiff had persisted to not settle the judgment debt even after it was made clear all along that the plaintiff owed monies against the defendant.

(vi) The defendant also in his submission in reply had contended that the underlying reason behind the withdrawal of his appeal against the dismissal of the first petition was that the defendant's previous solicitors had done so for practical reasons in that notwithstanding the probability of succeeding on the issue of solvency, the petition might also fail on other procedural non-compliance.

(vii) With regard to the contention of malice of the advertisement under the petitions, the defendant in his reply had submitted that as the defendant had the rights to lawfully pursue the petitions, the advertisement and gazetting of the petition is a mandatory procedure which needs to be complied. Failing to do so would be a deliberate non-compliance of the petition's procedures. In this contention, the defendant had invited the attention of the court to the case of *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390 (HC). The court in this case dealt with an appeal against the trial judge's decision to dismiss an application to injunct the advertisement of a winding up petition against the respondent. In dismissing the appeal, Vincent Ng J had held at p 396 of the decision:

> I dismissed the ex parte application in encl 5 solely for the reason that I was of the considered view that this court cannot injunct the petitioners from exercising their statutory right – and indeed a mandatory requirement – to advertise the petition, under r 24 of the Companies (Winding Up) Rules 1972...

(viii) The defendant also submitted that a demarcation must be drawn with the findings of the dismissal of the first petition and the plaintiff's cause of action in tort of abuse of process. The demarcation sought to be drawn was the fact that the dismissal of the first petition was merely a finding of abuse under O 18 r 19(1)(b), (c) and/or (d) of the Rules of High Court and not in any manner a finding of liability on the tort of abuse of process. Here the defendant referred the court to the case of *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* (p 6) whereby the court in that case had held

that a petition may be struck off for abuse of process, but damages from such abuse must be pursued in a separate suit.

(ix) Thus, it was submitted that even if the defendant be bound by the decision of the dismissal of the first petition, the dismissal only pertains to a finding of an abuse of process, and not a tort of abuse of process.

(x) The defendant then follows to imbue some doubts over the plaintiff's case in that the plaintiff was lacking in candour when the plaintiff, against their own testimony on proper accounting practice, had never disclosed the judgment debt in any of its audited accounts. The defendant invited this court to refer to the NOE with regards to the testimonies of PW1 and PW3:

LCL:	Can you please check? Let us start from the audited accounts for 2008. Mr Isma, can you please refer to Bundle B pages 53 until 83. Bundle B, 53 onwards.
ISMA:	2008 don't have
LCL:	2008, never disclosed.
ISMA:	Yes, never disclosed.
LCL:	Look at 2009, it's from page 84 to 115.
ISMA:	Also not disclosed.
LCL:	Also not disclosed. 2010 at pages 116 to 147.
ISMA:	Also don't have.
LCL:	2011 at pages 148 to 179.
ISMA:	Don't have. I confirm that. (00:17:48)
LCL:	Okay now, 2012, that is found in the B1, the next bundle, Bundle B1, pages 64 to 100.
ISMA:	Also don't have.

(xi) And lastly, the defendant sought to disprove the damages alleged to have been suffered by the plaintiff. The defendant submits that the nexus attempted to be drawn by the plaintiff was done vide the letters' inter alia:

(i)An unsigned letter dated 13 July 2009 from Gasco Pte Ltd to the plaintiff. In which the defendant submits that this letter and it contents were in totality documentary hearsay as the maker of the letter was not called to testify as a witness before the court. Even if it were to be considered, the content of the letter merely shows concerns over the first petition and a request by the author to take action to resolve the matter.

(ii)A letter dated 15 July 2009 from Independent Technology Sendirian Berhad to the plaintiff. In which the same objection was raised that the document is entirely

documentary hearsay whereby the maker of the letter was not called to testify. Even if it were to be considered, the letter merely expressed the author's concern on the plaintiff's ability to undertake and perform the project with them.

(iii) With regard to the second petition, a letter dated 6 May 2013 from RHB Bank to the plaintiff. Similarly, the same objection of documentary hearsay is raised in that the maker of the letter was not called as a witness. Even if the letter were to be comprehended, the content only indicates that the plaintiff's application for credit facilities was declined on the reason of 'history of credit default, management risk concern and unresolved civil suit'. Thus, the decline was on a multitude reasons and not necessarily the petition per se.

(xii) It is interesting to note that the plaintiff had not at all referred to these letters in proving its damages allegedly suffered but relied mainly in the audited accounts of the plaintiff to prove its losses. The defendant then relied upon the decision delivered by Thomson CJ in a Civil Appeal, in the case of *Lee Sau Kong v Leow Cheng Chiang* [1961] 27 MLJ 17. The case dealt with general damages in the sense of loss of business and profits. With regard to that claim, the court had held:

> With regard to the claim for damages, I would preface what I have to say by quoting the following passage..... Plaintiff must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write it down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

(xiii) Lastly, the defendant submits that in lieu of the plaintiff's failure in proving his damages, the plaintiff, if in the event of successfully proving their action, should only be awarded nominal damages. The defendant had referred to the decision of Thomson CJ in the case of *Lee Sau Kong v Leow Cheng Chiang* (p 25) in which the court had held:

> With regard to the claim for damages I would preface what I have to say by quoting the following passage from the judgment of Lord Goddard in the case of Bonham Carter v Hyde Park Hotel Ltd:
>
> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: "This is what I have lost; I ask you to give me these damages." They have to prove it.

In furtherance to their submission, the defendant then relied upon the case of *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 where Abdul Malek Ahmad JCA (as he then was) held:

When damages is shown but the amount is not proved, the court will usually award nominal damages. The trial judge was correct in concluding that the loss had not been proved sufficiently by the defendant and was right in giving judgment for RM 10 as nominal damages for the loss of interest on project investment and loss of income on investment.

THE FINDINGS OF THE COURT

[8] The first issue that this court shall deal with is the elements of malicious prosecution sought to be proven by the plaintiff.

Whether the earlier proceedings had been in the favour of the plaintiff

(1) Firstly, with regard to the element that the earlier proceedings must be decided in the favour of the plaintiff, it goes without saying that this element had been proven. It was already undisputed that the two petitions were dismissed against the defendant and these dismissals were indeed in the plaintiff's favour. Thus the court finds that the first element in proving malicious prosecution is proven by the plaintiff.

Whether the two petitions were initiated with a want of reasonable and/or probable cause of action

(2) The crux of the debate between the two parties in in fact, is the issue of whether the two petitions filed by the defendant was indeed without reasonable and/or probable cause and such determination would determine whether there was indeed an abuse of process and whether the second element in proving malicious prosecution had been proven by the plaintiff.

(3) In answering this issue, there are other sub-issues which must be determined before any findings could be made as to whether or not the petitions were initiated without reasonable and/or probable cause of action.

(4) This court is minded that the main factor to be determined in answering this issue is to determine whether or not the plaintiff solvent and had the ability to pay his debts.

Whether the contention that the plaintiff was subsisting on negative cash flow needed to be specifically pleaded?

(5) Along the plaintiff's submission in reply, the plaintiff had raised an objection against the defendant's contention in regards of the plaintiff's alleged negative cash flow in that the said contention was not pleaded. Upon perusing the defendant's statement of defence, the court finds that the contention had sufficiently been pleaded. Although it was worded in reference to the failure of complying with the statutory notice under the petition, the contention of the inability of the plaintiff to pay its debts was already pleaded. Anything else to the effect of proving or disproving the plaintiff's ability to pay debts are supporting facts. Even the plaintiff themselves sought to prove the solvency through their own sets of facts and evidence. The contention by the defendant on the plaintiff's negative cash flow also brings forth the same effect; in that it ought to prove or disprove the solvency and ability of the plaintiff to pay its debts. Thus, this court is of the considered view that the contention on negative cash flow need not be specifically pleaded.

Whether the conduct of the defendant in withdrawing their appeal against the first petition is an admission and/or acceptance to the solvent state of the plaintiff?

(6) It was persistently reiterated in the plaintiff's submission that the dismissal of the first petition on the ground of the plaintiff's solvency remained uncontested. Not only was it not appealed against, the defendant had in fact withdrawn his appeal against the dismissal.

(7) In the defendant's submission in reply, the defendant had sought to justify his conduct in withdrawing the appeal against the first petition in that the withdrawal was done on the advice of the defendant's solicitors then. It was withdrawn on the supposed reason that even if the defendant may be successful in his appeal on the issue of solvency, the appeal might fail because of other procedural non-compliance.

(8) In consideration of the submissions of both of the parties, this court is of the view that notwithstanding the underlying reason behind the defendant's withdrawal (which was void of any supporting evidence) the fact remains that the decision was uncontested. The

conscious decision of the defendant to not appeal against the decision infers the acceptance and agreement of the defendant to the dismissal and its grounds.

Whether the defendant as judgment creditor was justified in law to opt for winding up petitions in lieu of other modes of executions?

(9) Although this is more relevant to the determination of the tort of abuse of process, this court finds relevance of this issue to determine whether or not the petitions filed by the defendant had reasonable and/or probable cause of action. This is because, if it was found that the defendant had unlawfully opted for execution vide winding up petitions, it equally may infer malicious intent in that the defendant had pursued the two petitions in complete disregard of the law (as had been submitted by the plaintiff in their submissions)

(10) The defendant had relied closely to the case of *Pembinaan dan Pemaju Mahajiwa (Selangor) SDN v ASM Development Sdn Bhd* (p 19). The relevance sought to be applied by the defendant was that the decision of this court had held that it is not an abuse of process for the defendant to opt for one mode of execution when it had two options before it. For the convenience of reference, the excerpt relied upon is reproduced here:

> It is true that the appellant did not appeal against the order of the SAR in striking out the first suit. But that is a matter for the appellant to decide. The appellant had an option to whether to try to save the first suit or to abandon it and file a fresh suit… To sum up, on the facts of this case, where the appellant had two options before it, the fact that it chooses one and not the other, is not an abuse of the process of the court.

(11) This court does not at all intend to contra the decision of the Federal Court in the case above. However, this court is of the considered view that even in the application of this case, the case does nothing to support the defendant's contention.

(12) The case relied upon was regarding a case which was struck out because of a non-compliance of a court order, which is totally different from this case. In the present case before the court, the two petitions was not merely struck out because of a non-compliance of direction, but instead an act of abuse of process itself. It begs to be vastly different from the Federal Court decision. The present case before the court was struck off for the want of cause of action, not mere non-compliance. It was decided in the first petition in 2009

that it was an abuse of process. And to re-agitate the matter in the same manner in the second petition (which indeed was dismissed for the same reason) is indeed again, a further abuse. A blatant abuse in fact, to go against the judgment which was admitted and filing the same action in court notwithstanding the earlier decision.

(13) This court is in agreement with the Federal Court that it would not be an abuse of process if the defendant were to opt for one option available to him amidst other options which were also available to him. However, if one of the options is unavailable to be utilised (because the company is solvent) it is incumbent of the defendant to employ other methods of execution and not persistently and blatantly pursuing for a remedy unavailable to them. In the present case, the abuse committed is not at all on the issue of opting for winding up petitions in lieu of other modes of execution, but instead on the issue that the defendant had opted, out of many modes of execution, the mode of execution which was lawfully unavailable to them.

(14) The decision of the Federal Court had already intimated that the factum of abuse depends on facts of each case. And this court finds that the conduct the defendant here, in pursuing an option knowing that it was an abuse of process, is indeed an abuse of process and therefore was unjustified in opting to pursue the two winding up petitions.

Whether the plaintiff was indeed solvent and able to pay his debts at the time the two petitions were filed against them?

(15) This court is minded that there are various evidences and contentions which were laid down by both of the parties in proving or disproving the plaintiff's solvency. The court shall delve into each submission and address them separately, before making a final finding on the solvency of the plaintiff.

Whether negative cash flow is proof of insolvency and/or inability to pay debt.

(16) First, this court will address the defendant's contention on the plaintiff's state of account, in that it was admitted to be on a negative cash flow. Upon perusal of the NOE it was indeed admitted that the plaintiff indeed was subsisting on a negative cash flow from the year 2008 till 2012. And upon the test of commercial insolvency, although the plaintiff may have more assets than its

liabilities, it doesn't necessarily connote that it is solvent and able to pay its debts. The plaintiff must have immediate realisable assets to pay its debts when it falls due. This contention is earlier elaborated at para 5.2 of this decision. (See *Pioneer Concrete v Celini Corp* (p 16); *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* (p 18); *Hotel Royal TD Bhd v Tina Travel & Agencies Sdn Bhd* (p 19).)

(17) From the outset, it needs to be noted that this court does not intend to contra the decisions of the cases mentioned above. This court does not at all dispute the proposition of law regarding the test of commercial insolvency. Nonetheless, merely agreeing to the proposition of law, does not mean that the defendant have proven their case. From the submissions of both parties, the propriety of the test of commercial insolvency is not at any time an issue.

(18) Nonetheless, this court is in agreement with the plaintiff in its submission in reply that none of the cases relied upon by the defendant stipulate that the fact of subsistence vide negative cash flow is cogent proof of insolvency and/or inability to pay its debts. All it proves is that at the time being of negative cash flow, the company was running on borrowings. Just the mere fact the plaintiff subsists on borrowings does not at all effectively proof that it cannot pay its debts. Many businesses utilise borrowings such as loans and credit facilities in running their businesses with genuine trade. Businesses undertake loans to run their trade. A negative cash flow does not indicate an inability to pay. Even the case laws do not indicate as such at all. Thus, the defendant's contention hitherto is void of any support.

Whether there was an admission of the plaintiffs solvency and ability to pay its debts by the defendant's own witnesses.

(19) The plaintiff had referred the court to the NOE with regards to the defendant's witnesses' testimonies. For the sake of convenience, the excerpt of the NOE at p 123 which the court finds relevance is reproduced here:

KEE: Saya Winding Up because he is a big company. He is a big company, he will not allow me to Winding Up. He will pay me, he will make a point to pay me but he still stubborn, he don't want to pay me...

HMS: Encik Kee, saya cakap sama Encik Kee punya niat. Saya tunjukkan, sebelum fail Winding Up Encik Kee sudah tahu dia ada duit boleh bayar. Betul?

KEE: Memang saya tahu. Ya. That's why.

(20) This is the evidence of DW1 who is the defendant himself. It is utterly vivid that the defendant himself knows of the solvency of the plaintiff to pay its debts. He had admitted so twice in the above iteration. DW1 stated that the plaintiff was a 'big company' and that 'he will make a point to pay me'. And when queried on his knowledge before filing the winding up petition if he had known the plaintiff had the money to pay, DW1 had answered in the affirmative; in that he indeed knew full and well, prior to the filing of the winding up petition, that the plaintiff is able and has the money to pay its debts. Thus it is the finding of this court that it was indeed admitted by the defendant himself that the plaintiff was solvent and had the capability to pay its debts.

Finding of the court on the solvency and ability to pay debt of the plaintiff.

(21) Upon due and proper consideration of all the above determinations, it is this court's considered view that the plaintiff is indeed solvent and able to pay its debts at the time the defendant had filed the two petitions against the plaintiff.

Finding of the court on the absence of reasonable and/or probable cause of action in the filing of the two petitions by the defendant

(22) Following the earlier finding in para 7.21, since the plaintiff is found to be solvent and able to pay its debts at the time of the two petitions were filed, it is this court's finding that the two petitions were wrongfully presented and this is void of reasonable and/or probable cause, and indeed was an abuse of process of the court. This court finds valuable reliance to the case of *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* (p 6) in which the court in that case had held:

> ... that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shown, there was a want of reasonable and probable cause for presenting the petition... (see also *Pacific & Orient Insurance*)

Whether the conduct of the defendant in filing the petition actuated by malice or improper motive.

(23) In perusing the plaintiff's submissions, in simpler terms, the plaintiff defines malice in two contexts;

(24) In that firstly, the conduct of the defendant in filing the two petitions were actuated by malice in the sense of an improper motive other than to seek genuine redress of the court. The plaintiff had likened this improper motive to the conduct of the defendant in blatantly filing the two winding up petitions knowing full well that that option was not only unavailable to them, but also injurious to the plaintiff's business. This court would reiterate its earlier finding that indeed the defendant had filed the two petitions with the said knowledge prior to the filing of the petitions. The plaintiff first had submitted to demonstrate the injurious nature of a winding up petition in reliance of the case of *Quartz Hill Consolidated Gold Mining Company v Eyre* (p 6) where the court had opined that bankruptcy actions (in the present case the two petitions) would cause serious imputations against the respondent even before the respondent would have the opportunity to defend itself because of the procedure of advertisement and gazetting. The plaintiff further submits, in light of the injurious nature of the petitions, the blatant conduct of the defendant had befall upon them unnecessary peril.

(25) Even more so malicious, when the petitions were filed knowing that it was wrongfully presented. This court is in further agreement with the plaintiff in reliance to the case of *Cadiz Waterworks Company v Barnett* (p 10) in which the court in that case had held that if a petition was presented knowing it will fail (alike the defendant in this case as per the earlier finding) it may well be an utterly unjust demand. This court is also in further agreement with the plaintiff in reference to the case of *Johnson v Emerson* (p 12) which had held that an action of a defendant in taking proceedings with the knowledge and belief that they could not be properly taken, would be some evidence of malice.

(26) Mirroring such action is the blatant conduct of the defendant in taking the two petitions knowing that it could not be properly taken. As per the earlier finding, even PW1 admitted that he knew at the time before the petitions were filed, that the company would make a point and would be able to pay him. Even more so with regards to the second petition, the defendant had completely ignored the plaintiff's letter disputing their statutory notice of demand on the ground of solvency and ability to pay its debts. And additionally, this court finds that in wrongfully petitioning for winding up, knowing that the plaintiff was solvent is a conduct of giving the court an untrue account of the plaintiff's solvency. And as per the case of *Malz v Rosen* (p 11), such conduct may be proof

of malice. Pursuing for the petitions knowing full well it will fail begs to draw the inference that, payment and compensation was not the motive of the defendant. Instead, not only for the sake of convenience, as the process of advertisement and gazetting may be injurious, the defendant had filed the petition to put the plaintiff in such injury. The court is of the considered view that the defendant had not genuinely sought for genuine redress and had conducted himself in malice.

(27) Secondly, the defendant's conduct was in reckless disregard of the law and the rights of the plaintiff. In echoing the finding above, as the defendant had opted for the petitions knowing full well that he is not legally entitled to (as the plaintiff was solvent) is vividly a conduct in utter disregard of the law.

(28) This court also intends to address the submission of the defendant in this issue. The court is minded that the defendant had at length argued that the question of motive is not at all relevant with regards to an unpaid creditor who prima facie, has the right to file winding-up petitions notwithstanding his motives. The defendant had referred to the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties* (p 15) and also the case of *Pioneer Concrete (M) Sdn Bhd v Celini Corporation Sdn Bhd* (p 16).

(29) This court is of the considered view that this is *merely a prima facie rule*. Though indeed an unpaid creditor may lodge a petition to wind up, however being a prima facie rule, it must also be considered with other relevant rules of law of insolvency. And that law is that, a winding up petition should not be lodged in the circumstance that the debtor is still solvent. This court does not intend to contra the decision of the supreme court. Even with the application of the cases above, it does not at all go to the favour of the defendant. This is because as the precedent have stated, this is merely a prima facie rule. It is not an absolute right. The right may be disputed if there are valid grounds to dispute it. And the factum of the present case does disprove the right. Because in all of the cases relied upon by the defendant, the petitioner had the rights to petition.

(30) But in this case, the petitioner from the outset does not have the right to petition. The defendant's witnesses themselves had admitted that they knowingly are aware of the plaintiff as big company who is capable but reluctant to pay. And that he only

pursued winding up because it is the cheapest and accessible remedy to get his monies.

(31) This court is minded that the defendant had submitted that they hold no malice in advertising the petition as it is a mandatory procedure in a winding up petition and that not doing so would be a blatant procedural non-compliance. The defendant had relied on the decision of Vincent Ng J, in the case of *Azman & Jay Associates v Sentul Raya Sdn Bhd* (p 21)

(32) With regard to this contention by the defendant, this court, firstly, do agree with the proposition of law referred to. Nevertheless, although it is indeed a statutory requirement, from the outset, the statutory right to proceed for the winding up petition was already absent for the defendant. To pursue the same knowing that it is unlawful to do so, is proof of malice.

Finding of the court on the tort of malicious prosecution

(33) In appreciation of the foregoing findings above, the court finds that the plaintiff had successfully proven its case on the tort of malicious prosecution.

(34) The next issue for determination of this court is whether the plaintiff had suffered damages arising from the defendant's malicious prosecution.

D. Whether the plaintiff had suffered damages arising from the defendant's malicious prosecution

(35) The parties had referred to two different decisions which had delved into the claim of general damages. So to speak, the plaintiff had relied upon the Rajasthan High Court decision in the case of *Onkarmal & Anor v Banwarilal & Ors* (p 13) and the defendant relied upon the case of *Lee Sau Kong v Leow Cheng Chiang* (p 25).

(36) After perusing these two cases put forth by the parties, the court finds more assistance and relevance to the case of *Lee Sau Kong* as referred to by the plaintiff. This is on the ground that firstly, it is a case decided by our own Court Civil Appeal – (Malaya) rather than the distant case decided in the High Court Rajasthan. Thomson CJ's decision in *Lee Sau Kong*'s states the legal position in Malaysia.

Secondly and most importantly, the case of *Onkarmal & Anor v Banwarilal & Ors* (p 13) dealt with a claim in general damages from the act of wrongful confinement. This is verily different from the case before the court here. Of course it would be seemingly impossible to quantify general damages so suffered from the act of wrongful confinement. In contrast, the case of *Lee Sau Kong* is indeed more relevant to the present case as the court there had dealt with general damages in the sense of loss of business or profits (which is most definitely the case in the present case before the court today).

(37) Not only that, although it was submitted by the plaintiff that general damages need not be specifically proven, the plaintiff itself had attempted to prove its loss of business through its audited accounts. It seems to indicate that the plaintiff itself agree that in its head of general damages, it still requires evidence to substantiate its claim.

(38) What is more perplexing is the fact that the plaintiff, against its own evidence to prove nexus of the damages to the conduct of the defendant through numerous letters from its trade (see para 6(3)(k) of this decision) had not at all submitted on these letters. The plaintiff mainly had only referred to the testimonies of its own witnesses and the audited accounts. This begs the indication that the plaintiff itself had shun away from its duty of proving the nexus between the damages allegedly suffered and the conduct of the plaintiff.

(39) This court is in total agreement with the defendant in his submissions against the numerous letters mentioned above in that they are documentary hearsay (as none of the authors of the said letters were called to testify) and that even the letters were to be admissible, the contents prove very little nexus between the damages allegedly suffered to the conduct of the defendant.

(40) Now this court is also minded that the plaintiff submitted that the figures of loss of business from the audited accounts and its witnesses had not been challenged by the defendant and should be deemed as an admission. Nonetheless, even though they are unchallenged, these evidences can only go so far to prove that the company suffered losses without any proof of nexus to link the losses to the conduct of the plaintiff. The plaintiff might lose business for multifaceted reasons. The absence of proof any nexus

to link the defendant's conduct to the loss does not at all prove the plaintiff's claim.

(41) This court needs to emphasis here, the losses alleged to be suffered from the petitions were actually motivated by the plaintiff's own reluctance to settle the judgment debt. Although the court finds that the petitions were indeed an abuse of process, the fact stands that the two petitions came about (though abusively) out of the plaintiff's own refusal to pay. The plaintiff cannot deny its own doing in motivating the defendant to file the petitions. It is incumbent upon the plaintiff to actually pay the judgment debt. The judgment debt had undergone numerous applications and appeals and even then the judgment debt still stands and still unpaid until today. Thus, although the petitions were wrongfully presented, the court would not allow the plaintiff to profit from a wrong which the plaintiff itself had indirectly contributed to.

(42) Therefore, upon due and proper consideration of the submissions above, this court is in agreement with the defendant that in failing to prove its losses or the extent of its losses attributable to the wrongful presentation of the two petitions by the defendant, the plaintiff should only be entitled to nominal damages. This court does not deny that the plaintiff had not suffered damages but the court does not find any cogent evidence in proving the extent of damages suffered attributed to the defendant's wrongful presentation of the two petitions and thus the plaintiff should only be entitled to nominal damages (see *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* (p 26)).

Finding of court on the tort of abuse process

[9] The second cause of action of the plaintiff was for the tort of abuse against the defendant's conduct in filing the two petitions. Now from the outset, this court is in agreement with the defendant that merely depending on the decision of the dismissal of the first petition in 2009, does little to prove the elements of the tort of abuse of process. Indeed in perusing the dismissal of the first petition, the first petition was dismissed for abuse of process under O 18 r 19(1)(b) and/or (c) and/or (d) and not for the tort of abuse of process. The decision even goes to the extent to refer to the case of *Si & Si v Hazrabina Sdn Bhd* (p 6) which had held that upon a petition being struck out, damages must be sued by way for an entirely separate suit. But equally so, merely submitting that the dismissal was not for tort of abuse of process, does not automatically rule out the tort of abuse of process. The fact remains that upon the earlier

finding of this court, the two petitions were wrongfully presented and is indeed an abuse of process.

[10] Nonetheless, this court finds valuable assistance to the decision of Gopal Sri Ram JCA (as he then was) in the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed* (p 20) at p 438 which was referred to by the defendant. The court there had laid down the elements to prove the tort of abuse of process which are namely:

The process complained of must have been initiated

(1) Reiterating the earlier finding of this court above with regard to the tort of malicious prosecution, this courts finds that indeed the process (being the two petitions) complained of have indeed been initiated. Thus the first element indeed had been proven.

The process initiated was purposed other than the purpose to obtain genuine redress. In other words, it was aimed to produce a result not intended by the invocation of the process

(2) Similar to the earlier findings above on the issue of the tort of malicious prosecution, the court finds that indeed when the defendant had opted to file the two petitions, with prior knowledge, knowing full and well that the plaintiff was solvent, and that the petition would fail, the defendant had not pursued the petitions for genuine redress and/or the result intended from a bankruptcy proceeding. A winding up action is purposed to seek redress in the circumstance of the respondent concerned is indeed insolvent. And for the defendant to pursue the petition knowing that the plaintiff was solvent, clearly indicates that they had not pursued the two petitions for genuine redress intended under the invocation of the process (being the petitions and/or the bankruptcy actions). Thus, this court is of the considered view that the second element of the tort of abuse of process had been proven.

(3) Upon the immediately preceding findings above, the court finds that the plaintiff had proven their case and that the defendant is liable for the tort of abuse of process in wrongfully presenting the two petitions.

(4) Now, having found that the defendant is liable for the tort of abuse of process in wrongfully presenting the two petitions, the next issue to be determined is whether the plaintiff had suffered some damage

or injury in consequence to the conduct of the defendant.

Whether the plaintiff had suffered some damage or injury in consequence to the conduct of the defendant

(5) Again, as similarly found in the findings above with regards to the tort of malicious prosecution, this court draws the same finding that the plaintiff although may have suffered damages from the wrongful conduct of the defendant (being the presentation of the two petitions), had not adduced cogent evidence to prove the extent of damages suffered attributable to the conduct of the defendant. As such, the plaintiff would only be entitled to nominal damages.

Other issues

(i) The issue of non-disclosure of the judgment debt in the audited accounts

[11] This court is minded that the defendant had raised the issue of the plaintiff withholding the judgment debt in their audited accounts. Alluding to this issue, the court is of the opinion that the issue is of little significance to the case. Even if there was lack of candour in the accounting practice of the plaintiff, it does not at all prove that the plaintiff was solvent or otherwise at the time the two petitions were filed. The defendant had not adduced any cogent evidences or figures to prove that with the inclusion or disclosure of the judgment debt in the audited accounts, it will prove that the plaintiff was insolvent and unable to pay its debts. Thus, this court shall not delve further into this issue.

(ii) The issue of set-off and/or counterclaim

[12] Along the submissions of both of the parties, the parties had contended on the underlying reason of the plaintiff in withholding the payment of the judgment and whether the withholding of the payment justified in law. Again, this court finds little significance of this issue in the case before the court. The present case deals with the propriety of the initiation of two winding up petitions in the face of the fact of the solvency of the respondent (in the present case, the plaintiff). This court shall not delve into the reasons or justification behind the non-payment as it is to the opinion of this court that it does little significance to prove or disprove the case of the plaintiff. Merely because the plaintiff had withheld payment of the judgment debt (whether justly or unjustly) does not justify the defendant to wrongfully present the two winding up petitions.

A CONCLUSION

[13] This court earlier in its judgment had found the defendant liable for both the tort of malicious prosecution and the tort of abuse of process in the defendant's conduct in wrongfully presenting the two winding up petitions against the plaintiff while having full prior knowledge that the plaintiff was at that time, solvent and able to pay its debts. Nevertheless, although the defendant is found liable, the court also finds that the plaintiff had failed to produce cogent evidence to prove the damages or injury or the extent of damages or injury caused by the defendant's tortious conduct and thus, the plaintiff is only entitled to nominal damages.

[14] It is trite law that trial court's power to grant nominal damages is a discretionary one. It is also trite that this discretionary power must be judicially exercised by the court. In the present case, this court had earlier emphasised and again this court reiterates that both petitions filed by the defendant were actually motivated by the plaintiff's own reluctance to settle the judgment debt. Although the petitions were wrongfully presented, this court would not allow the plaintiff to profit from a wrong which the plaintiff itself had indirectly contributed to. This court is also mindful that the judgment debt is still unpaid and still owing to the defendant. The act of the plaintiff in refusing and neglecting to settle the defendant's judgment debt which was validly obtained from the court of law must be given utmost consideration and cannot be ignored. On the facts of this case, this court is of the view that the plaintiff's conduct in ignoring the judgment debt todate is a flagrant disrespect of the law on the part of the plaintiff. Therefore, in these circumstances, this court allows the plaintiff's claim and awards with nominal damages of RM10.

ON THE ISSUE OF COSTS

[15] On similar grounds as stated in para 13 above, this court is of the view that an order directing each party to bear his own costs would be an appropriate and just order.

Claims allowed.

Reported by Afiq Mohamad Noor